KEYWORD: Financial; Personal Conduct; Criminal Conduct

DIGEST: Applicant has a history of delinquent debts that he and his wife accrued during a period they were essentially unemployed and didn't address until after the issuance of the SOR. By paying two of the three delinquent debts and working out a payment arrangement with the remaining creditor, he mitigates financial concerns associated with his delinquent debts. He also successfully refutes allegations of criminal conduct. However, he is unable to mitigate the omission of his debt delinquencies and criminal charges in his executed security clearance application (SF-86) under any of the pertinent mitigation guidelines. Applicant's knowing and wilful omissions raise continuing security concerns about his judgment and reliability. Clearance is denied.

CASENO: 03-04/49.h1		
DATE: 09/21/2004		
DATE: Soutombor 21, 2004		
DATE: September 21, 2004		
In re:		
SSN:		
Applicant for Security Clearance		
ISCR Case No. 03-04749		

# DECISION OF ADMINISTRATIVE JUDGE ROGER C. WESLEY

# **APPEARANCES**

# FOR GOVERNMENT

Eric C. Borgstrom, Department Counsel

#### FOR APPLICANT

Pro Se

#### **SYNOPSIS**

Applicant has a history of delinquent debts that he and his wife accrued during a period they were essentially unemployed and didn't address until after the issuance of the SOR. By paying two of the three delinquent debts and working out a payment arrangement with the remaining creditor, he mitigates financial concerns associated with his delinquent debts. He also successfully refutes allegations of criminal conduct. However, he is unable to mitigate the omission of his debt delinquencies and criminal charges in his executed security clearance application (SF-86) under any of the pertinent mitigation guidelines. Applicant's knowing and wilful omissions raise continuing security concerns about his judgment and reliability. Clearance is denied.

# STATEMENT OF CASE

On November 10, 2003, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to Applicant, which detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant, and recommended referral to an administrative judge to determine whether clearance should be granted, continued, denied or revoked.

Applicant responded to the SOR on December 17, 2003, and requested a hearing. The case was assigned to me on May 5, 2004, and was scheduled for hearing on June 4, 2004. A hearing was convened on June 4, 2004, for the purpose of considering whether it is clearly consistent with the national interest to grant, continue, deny, or revoke Applicant's security clearance. At hearing, the Government's case consisted of five exhibits; Applicant relied on three witnesses (including himself) and ten exhibits. The transcript (R.T.) of the proceedings was received on June 15, 2004.

# **PROCEDURAL ISSUES**

Before the close of the hearing, Department Counsel moved to amend the SOR as follows: subparagraph 1.b to substitute the word Associates for Asspocoates and subparagraphs 2.s through h 2.3 to substitute the date of April 2002 for April 2003 (R.T., at 23-24). There being no objections from Applicant, and good cause being shown, Department Counsel's amendment motions were granted. Applicant was permitted to answer subparagraph 3.a, which he did not address in his response. Upon clarification of the allegation (*viz.*, that it was intended to address the underlying conduct pertaining to the arrests and charges referenced in subparagraphs 2.c through 2.e), Applicant admitted the arrests but denied doing anything wrong with respect to the conduct covered by the arrests (R.T., at 31-35).

#### **SUMMARY OF PLEADINGS.**

Under Guideline F, Applicant is alleged to have accumulated three delinquent debts: one with creditor 1 for \$2,061.00, one with creditor 2 for \$3,820.00, and another with creditor 3 for \$7,468.00.

Under Guideline E, Applicant is alleged to have falsified his SF-86 of April 2002 by failing to disclose (a) his debts over 180 days delinquent, (b) his debts over 90 days delinquent, ©) a felony theft charge of November 2000 (nolle prossed), (d) a domestic battery/assault charge of November 2000 (dismissed) and (e) a contributing to the delinquency of juveniles charge. The same alleged omissions are incorporated under Guideline J.

For his response to the SOR, Applicant admitted each of his debts, but denied falsifying his SF-86. He added an explanation to the contributing to the delinquency of juveniles charge, which he claimed to have followed a 1972 arrest of Applicant and four of his fellow soldiers on a weekend pass from a nearby Army training center, which to his claimed knowledge never resulted in charges.

# **FINDINGS OF FACT**

Applicant is a 53-year-old analyst for a defense contractor who seeks a security clearance. The allegations covered in the SOR, and admitted to by Applicant, are incorporated herein by reference and adopted as relevant and material findings. Additional findings follow.

Applicant and his wife experienced financial difficulties for several years following his move to his current state in 1999 to help look after his mother-in-law. Both Applicant and his spouse gave up their jobs in another state to make the move (see ex. 3; R.T., at 55-57). When neither could find comparable work they let some of their debts slide: among them

were creditors 1 through 3. Between 2000 and 2003, neither Applicant nor his spouse made any payments on these debts. While Applicant generally relied on his wife to pay incoming bills, he remained aware that his wife was not paying on any of his debts listed in the SOR (*see* ex. 3; R.T., at 90-91).

Since receiving the SOR, Applicant has taken steps to resolve his delinquent debts. He provides documentation of satisfying both his creditor 1 and creditor 2 debts in full (*see* exs. A and B). Under a payment arrangement he made with creditor 3 in February 2004, he has authorized bi-weekly automatic withdrawals from his personal bank account of \$150.00 (*see* ex. C; R.T., at 81-84). Through these bi-weekly payments he has been able to reduce the overall creditor 3 debt to about \$5,500.00 and hopes to pay off the entire amount by the end of 2005, if not sooner (R.T., at 66-68, 81-84 and 127).

In 1972, Applicant and four of his fellow soldiers from a local Army training facility had a weekend pass and traveled to a nearby city for a brief retreat. While in an adjoining room in a local hotel with two of his fellow soldiers, he received a knock at the door from a police detective investigating a report of housing females in his room. Finding no females in Applicant's room, the detective checked the adjoining room where the other two soldiers were staying and found females in this room. Applicant and his fellow soldiers were then driven to the local jail for questioning. Altogether, they spent about two weeks in jail while the investigation proceeded and charges of contributing to the delinquency of a minor were filed. Once the investigation was concluded, Applicant and his two roommates were cleared to return to their unit, which they did. The charges, in turn, appear to have been dismissed, or otherwise satisfactorily disposed of in Applicant's favor. Believing he was never charged with any offense, Applicant assumed there was nothing of record about this incident. He was mistaken: His arrest and charge were reported to the FBI who identified the arrest and charge in their official records and is covered by a 1973 CID investigation report (*compare* exs. 4 and 7 with R.T., at 53-55 and 94-95).

In November 2000, Applicant was working as an assistant manager for a local chain restaurant when he took home some food items in the freezer that were earmarked for disposal. Based on past experience, he believed he had the implicit approval of the manager to appropriate these old food items home with him. When the new district manager found out about it, she tried to fire not only his manager but Applicant as well. She then filed charges with the local police department accusing him of second degree theft (a felony). The case was *nolle prossed* in July 2001 upon Applicant's payment of \$303.48 in restitution and \$383.00 in court costs (*see* ex. 6; R.T.,at 57-60, 101-03).

During a quarreling incident with his spouse in November 2000 over his threats to leave her, Applicant's spouse jumped into the back of his truck, fell out, and bruised herself. Later, she called the police who pulled him over and arrested him for domestic assault and battery. After pleading no contest to the charges in January 2001, he was ordered to pay court costs, attend pretrial intervention and observe conditioned contact with his spouse (subject to her signing an affidavit fo consent). The charges against him were dismissed in March 2001 (see ex. 5; R.T., at 105-08).

When answering questions 38 and 39 of his April 2002 SF-86, Applicant answered in the negative to having any debts over 180 and 90 days delinquent. He initially attributed his omissions to reliance on his wife to pay his debts and his corresponding lack of knowledge that the three listed debts were delinquent. Applicant acknowledged at hearing,

though, to being aware that the three debts in issue were not addressed before receiving the SOR in November 2003 (R.T., at 97-99). Hearing acknowledgments are reinforced by his acknowledgments in his May 2002 DSS statement to having paid nothing on his listed debts since 2000 (*see* ex. 3). Based on his acknowledgments he cannot avert inferences his omissions were knowing and wilful.

Applicant also omitted his 1972 contributing to the delinquency of juveniles charge from his answer to question 21 in his April 2002 SF-86. After initially expressing a lack of knowledge any such contributing to the delinquency of juveniles charge being filed against him in 1972, he changed his position at hearing, acknowledging awareness of the filed charges amidst his belief the charges would not be of record (R.T., at 114-21). A belief that filed charged would not be in any public record for the government to access is much different than having no knowledge of any arrest or charges. Such admitted knowledge is enough to warrant drawn inferences of knowing and wilful concealment by Applicant.

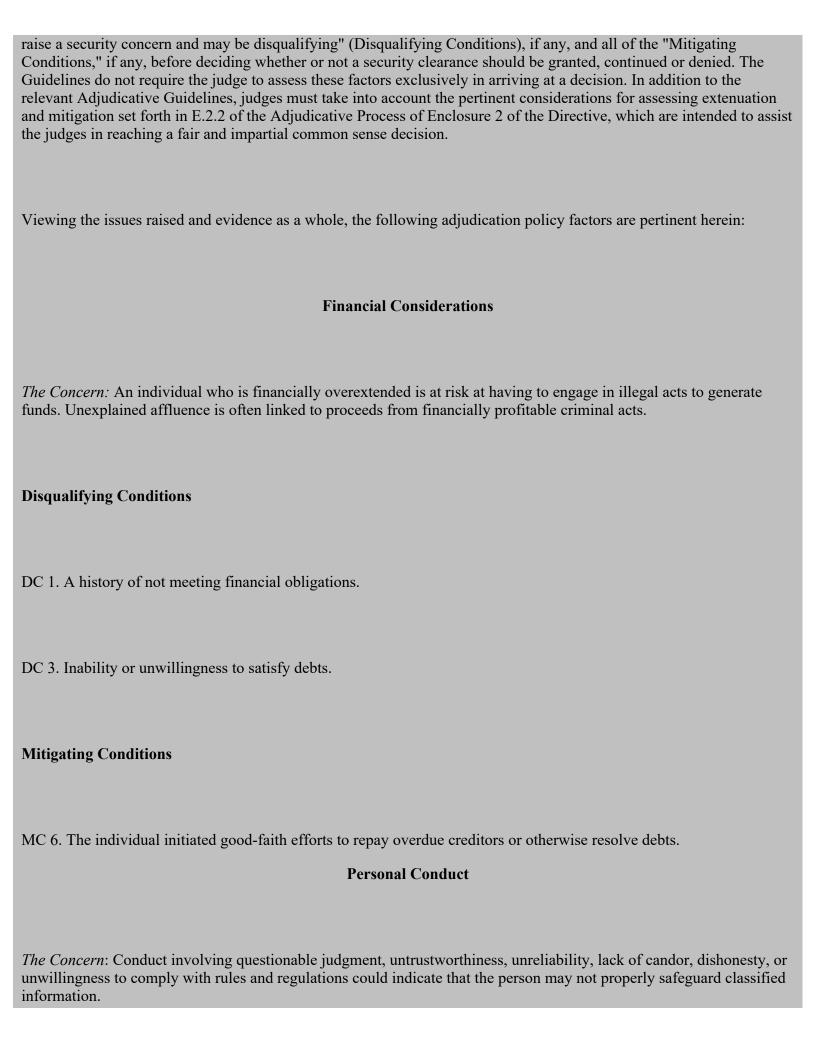
In answering question 21 of his SF-86, Applicant also omitted his 2000 theft and domestic battery charges. Just as with his 1972 delinquency of juvenile charge, Applicant did not simply misread the question, but rather omitted these charges in the belief they were not reported and likely would not be uncovered by DSS investigators (R.T., at 114-21). Applicant's omissions were the result of his knowing and wilful decision to avert disclosure of the charges, and not by any mistaken confusion or inadvertent memory loss.

When interviewed by a DSS agent in May 2002, Applicant disclosed both his listed debts when shown his credit report and two of his prior charges (*i.e.*, 1972 contributing to the delinquency of a minor charge and his 2000 theft charge) when asked about them. However, he did not disclose his assault and domestic battery charges until confronted by the same DSS agent in a second interview conducted in July 2002.

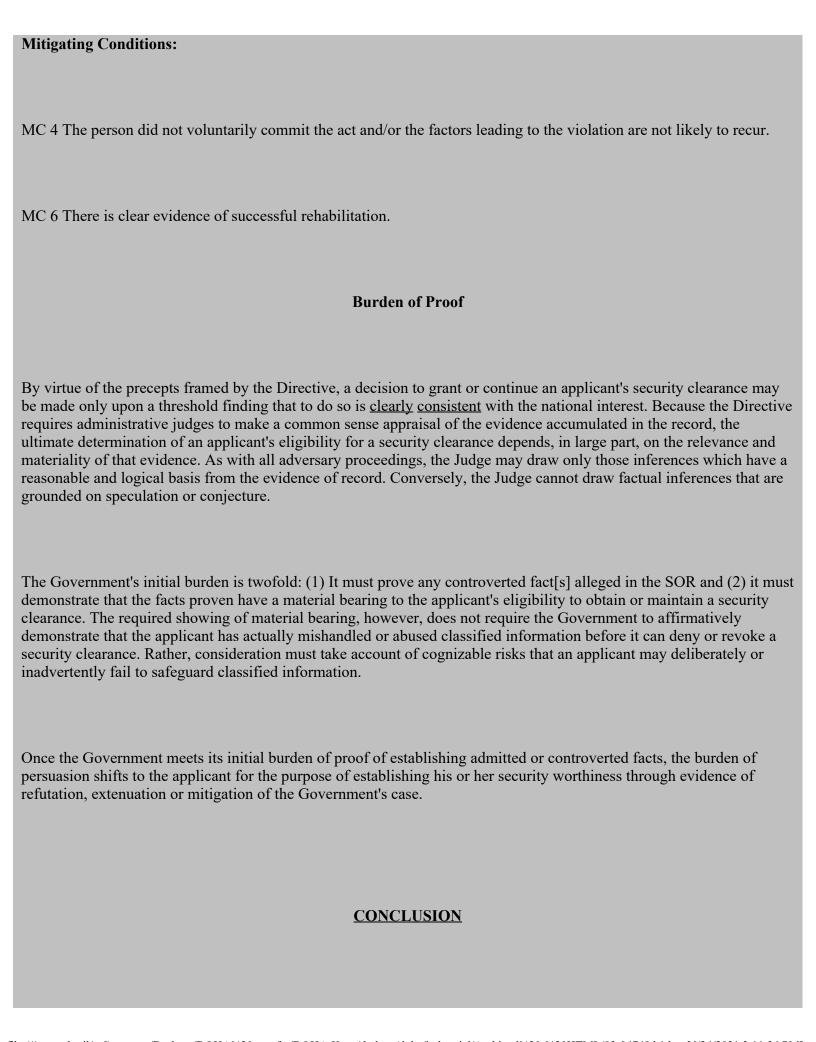
Applicant is highly regarded by his supervisor, coworkers, and representatives of the military customer he interfaces with as a reliable and trustworthy military analyst who can always be counted upon to contribute his wealth of skills and experience to ensure the successful completion of the missions he is assigned to (*see* ex. D; R.T., at 139-40). Both his performance evaluations and quarterly counseling reports attest to his superior contributions to his military training team (*see* exs. D and E). None of his references, however, were informed by Applicant of all of the charges filed against him since 1972 and his omissions of the same from his SF-86 (*see* ex. D; R.T, at 113).

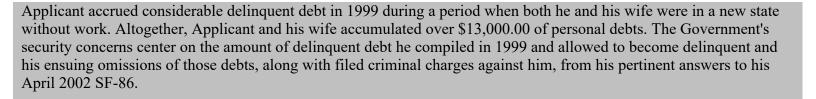
# **POLICIES**

The Adjudicative Guidelines of the Directive (Change 4) list Guidelines to be considered by judges in the decision making process covering DOHA cases. These Guidelines require the judge to consider all of the "Conditions that could



Disqualifying Conditions:			
DC 2 The deliberate omission, concealment, falsification or misrepresentation of relevant and material facts from any personnel security questionnaire, personal history statement or similar form used to conduct investigations, determine employment qualifications, award benefits or status,			
determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities.			
DC 3 Deliberately providing false or misleading information concerning relevant and material matters to an investigator, security official, competent medical authority, or other official representative in connection with a personnel security or trustworthiness determination.			
Mitigating conditions: None.			
Criminal Conduct			
The Concern: A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.			
Disqualifying Conditions:			
DC 1 Allegations or admission of criminal conduct.			
DC 2 A single serious crime or multiple lesser offenses.			





#### **Financial Issues**

Applicant's accumulated debts involve debts he and his wife accumulated after they had left their jobs in another state to move to their current state to care for his mother-in-law and couldn't find work. Each of these debts became delinquent after Applicant and his wife stopped paying on them for a three year period spanning 2000 and 2003. On this record, two of the Disqualifying Conditions (DC) of the Adjudicative Guidelines for financial considerations apply: DC 1 (history of not meeting financial obligations) and DC 3 (inability or unwillingness to satisfy debts).

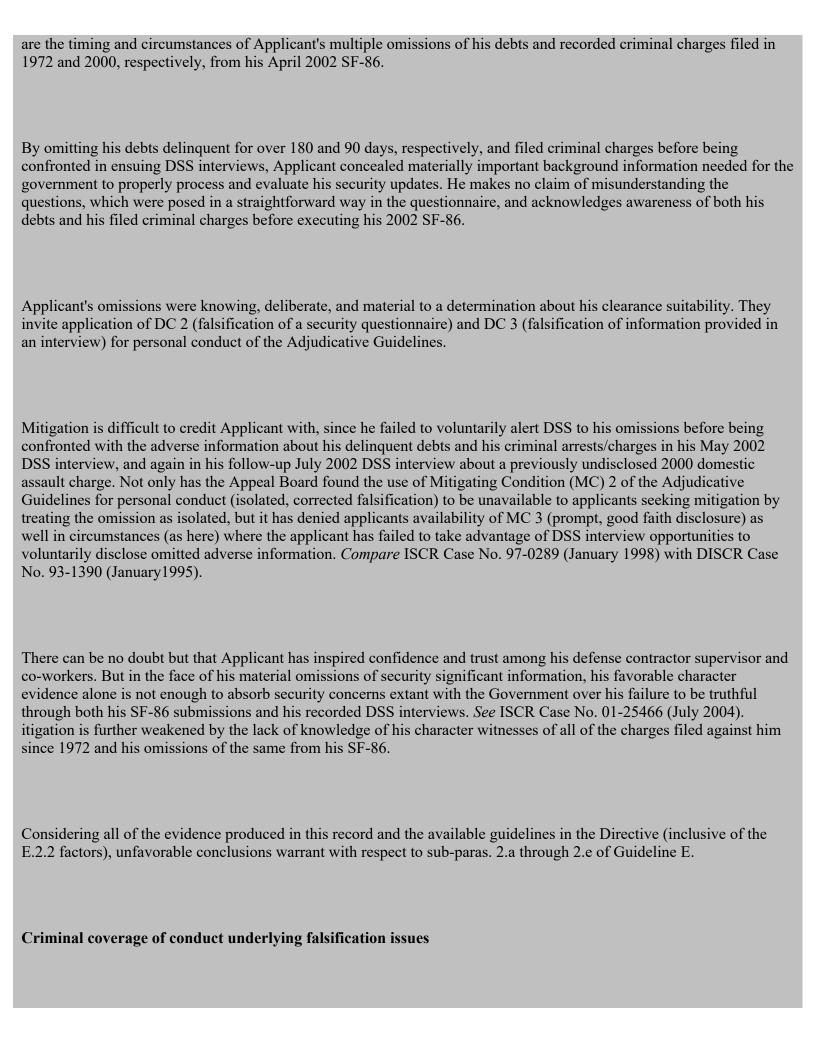
While the three listed delinquent debts of Applicant are extenuated to some extent, extenuation is not enough in and of itself to overcome the adverse trust implications associated with his accumulating these delinquent debts without any evidence of addressing them until he received the SOR. Since receiving the SOR, Applicant has paid two of the debts in full and worked out a satisfactory payment arrangement with the third creditor.

Applicant mitigates active security concerns associated with his debt problems by his payment of two of his debts and his arrangement of a payment plan with the third creditor that he provides documented payments on. Appraising Applicant's extenuating circumstances with respect to all of his covered debts, Applicant may take advantage of MC 3 (conditions largely beyond the person's control) of the Adjudicative Guidelines to extenuate his debt delinquencies. He may also avail himself of the mitigation benefits of MC 6 (initiated good-faith effort to repay overdue creditors) based on his repayment efforts.

Taking into account all of the circumstances of Applicant's accumulated debts and the good- faith efforts he demonstrated in satisfying his debts when he and his wife were able to with the aid of his father-in-law, favorable conclusions warrant with respect to subparagraphs 1.a through 1.c as to the allegations governed by the Adjudicative Guidelines pertinent to Guideline F.

#### **Falsification issues**

Potentially serious and difficult to reconcile with the trust and reliability requirements for holding a security clearance



While not a model of clarity, the underlying conduct covered in the falsification allegations reflect separate allegations of criminal conduct governed by Guideline J. That none of the covered arrests and charges resulted in a criminal conviction is not dispositive. The Appeal Board has repeatedly stated that the government can prove applicant engagement in criminal conduct, even in the absence of a criminal conviction. *Cf.* ISCR Case No. 94-1213 (June 7, 1996). Still, without denying the circumstances surrounding the underlying allegations that gave rise to the respective criminal arrests and charges covered by subparagraphs 2.c through 2.e, Applicant insists he did nothing legally wrong. Absent either admissions from Applicant or more probative proof of guilt than has been presented in the record, inferential proofs of probable guilt cannot be drawn. Based on a full review of the evidence and drawn inferences from the developed record, favorable conclusions warrant with respect to subparagraph 3.a of Guideline J.

In reaching my decision, I have considered the evidence as a whole, including each of the E 2.2 factors enumerated in the Adjudicative Guidelines of the Directive.

#### **FORMAL FINDINGS**

In reviewing the allegations of the SOR and ensuing conclusions reached in the context of the FINDINGS OF FACT, CONDITIONS, and the factors listed above, this Administrative Judge makes the following FORMAL FINDINGS:

GUIDELINE F (FINANCIAL): FOR APPLICANT

Sub-para. 1.a: FOR APPLICANT

Sub-para. 1.b: FOR APPLICANT

Sub-para. 1.c: FOR APPLICANT

GUIDELINE E (PERSONAL CONDUCT): AGAINST APPLICANT

Sub-para. 2.a: AGAINST APPLICANT

Sub-para. 2.b: AGAINST APPLICANT

Sub-para. 2.c: AGAINST APPLICANT		
Sub-para. 2.d: AGAINST APPLICANT		
Sub-para. 2.e: AGAINST APPLICANT		
GUIDELINE J (CRIMINAL CONDUCT): FOR APPLICANT		
Sub-para. 3.a: FOR APPLICANT		
<u>DECISION</u>		
In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue Applicant's security clearance. Clearance is denied.		
Roger C. Wesley		
Administrative Judge		